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SUBCONTRACTING CLAUSES UNDER SECTION 8(e) OF THE NLRA

Robert J. Hickey

Introduction

It should surprise no one familiar with the law of subcontracting and its anti-Teamster origins that this aspect of our labor legislation stands in very real need of clarification. The purpose of this article is to discuss and analyze the coverage of Section 8(e) of the National Labor Relations Act, as amended, and in doing so to analyze the difference between subcontracting clauses and "hot cargo" clauses.

Subcontracting means the transfer of unit work from the employees in the unit to other employees outside the unit and usually in another plant.¹ As noted by the Supreme Court in *Fibreboard Paper Products Corp. v. NLRB*,² the terms "subcontracting" or "contracting out" have no precise meaning and "are used to describe a variety of business arrangements. . . ."³ A "hot cargo" clause, on the other hand, is described and prohibited in Section 8(e)⁴:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

The difference between the two has been explained by then Professor Archibald Cox:

In a literal sense this [subcontracting] clause is an agreement between an employer and a union by which the employer undertakes not to do business with any other person, but it has a different function than the contracts which were the targets of Section 8(e). This restriction upon subcontracting seeks to protect the wages and shop opportunities of the employees covered by the contract by forbidding the primary employer to have work which employees might do, performed outside his own shop . . . something quite different in both purpose and effect from arranging to have secondary employees boycott non-union firms or specified employers or groups of employers because their labor policies are objectionable.⁵

1 While the term is generally meant to cover transfer of work from a plant of one employer to a plant of another employer, it can include the transfer of work to other bargaining units of the same employer. The employer has a right to allocate work in any nondiscriminatory manner and an agreement to so allocate work is not, of itself, discriminatory. The units deprived of the work can seek their own contract clause or can file a motion to clarify their representation certificate with the Board or can force an assignment by the Board under a Section 10(k) proceeding. See, e.g., *Milk Drivers Union (the Minnesota Milk Co. case)*, 133 N.L.R.B. 1314 (1961).

2 379 U.S. 203 (1964).

3 *Id.* at 215 n.8 (dictum).

4 Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(b), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. V, 1964).

5 COX, LAW AND THE NATIONAL LABOR POLICY 34 (1960).

I. Clauses Not Within the Wording of Section 8(e)

A. *Any Employer*: Section 2(2) defines "employer" as excluding the United States Government, a United States corporation or bank, any state or political subdivision thereof and nonprofit hospitals. Thus, Section 8(e) would, on its face, exclude agreements between unions and nonstatutory employers. The problem arises in the "handling products" clause since this clause applies only to the products of "employers." The "cease doing business" clause, on the other hand, is much broader since it applies to a cessation of business with any person.⁶

B. *To Enter Into*: The maintenance or reaffirmation of an existing contract clause has been held by the Board to constitute "entering into."⁷ If such a clause exists the parties must affirmatively disavow it.⁸ However, the maintenance, reaffirmation, or lack of disavowal must occur during the six-month period prior to the filing of the complaint with the Board.⁹

C. *Contract or Agreement, Expressed or Implied*: The main purpose of Section 8(e) is to outlaw certain agreements. There is nothing in the statute to indicate that normal rules of contract law do not apply in determining whether a contract exists. The sole difference between "contracts" and "agreements" appears to be one of formality. There is no requirement that the agreement be in writing. The difference between express and implied contracts is that an express contract is manifested by words, oral or written, and an implied contract is manifested by conduct, circumstances or relationship of the parties showing that the parties intended to make a contract.¹⁰ Under these terms it would appear that all that is required to establish an unlawful objective is evidence disclosing conduct by the union attempting to force or require an employer to cease doing business with another person and acquiescence by the employer.¹¹

D. *Handling Products Clause*: Section 8(e) outlaws two basic types of agreements. The first comprises those agreements "whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer." Under such a clause, it is not necessary that the employer himself handle the product. In fact, the Board recognized that employers handle products normally through their employees. The Board held a clause invalid which forbids an employer from disciplining an employee who refuses to handle "hot cargo."¹²

6 National Labor Relations Act (Taft-Hartley Act) § 101, as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152 (1958).

7 Los Angeles Mailers Union (the *Hillbro Newspaper Printing Co.* case), 135 N.L.R.B. 1132, 1137 (1962).

8 Automotive Union (the *Greater St. Louis Automotive Trimmers* case), 134 N.L.R.B. 1363 (1961).

9 National Labor Relations Act (Taft-Hartley Act) § 101, as amended, 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1958).

10 The Board has mistakenly interpreted "implied" to mean an agreement which has the intended effect of an illegal clause. Truck Drivers Union (the *Patton Warehouse* case), 140 N.L.R.B. 1474, 1491 (1963).

11 Express and implied contracts are mutually exclusive, thus each must be litigated on its own merits in order to find a violation.

12 Amalgamated Lithographers, 130 N.L.R.B. 985 (1961).

The Board, while noting the right of an employee on his own to refuse to handle "hot cargo," also noted that in such circumstances the employer has the correlative right to require the employee to work or be discharged. Thus, a clause which merely preserves to the employer this choice would be valid but any clause which goes beyond this by taking away the employer's right to discharge would be an invalid Section 8(e) clause since the actual effect of such a clause is to cause a cessation of business.

The next question is whether the term "products" encompasses "services" for purposes of Section 8(e). The Board in the context of Section 8(b)(4)(B)¹³ has interpreted "products" so broadly that it encompasses almost all economic activity. In *Lohman Sales*, the Board stated: "so far as human effort is concerned, labor is the prime requisite of one who produces."¹⁴ This interpretation of "products" was applied by the Board to Section 8(e) in *Arden Farms*.¹⁵ The Supreme Court in *NLRB v. Servette*¹⁶ rejected a narrow interpretation of "products." However, the question remains whether "products" is coextensive with all forms of "services." In *Servette* the Supreme Court did not expressly adopt the rationale of *Lohman Sales* and, in fact, indicated some limitation by citing the Fair Labor Standards Act.¹⁷ Under the FLSA, an employee is covered only if he is engaged in actual or fringe production.¹⁸ In *Mitchell v. Zachry*¹⁹ the Supreme Court held that in order for new construction to come within fringe production either a facility of commerce or a facility of production must be constructed.²⁰ In *Mitchell v. Lublen, McGaughy & Associates*,²¹ the Court indicated that construction of a defense facility would be considered a facility of commerce. One may infer from these cases that the construction of private homes would not come within the term "production."

Even if "products" includes services, only those products of another employer are covered by the handling products clause. Neither products of the contracting employer nor those of his employees are protected. While a clause whereby an employer agrees to allow his own employees the right not to handle his own products would not come within the "handling products" clause, it probably would come within the "cease doing business" clause.

The Board, like the Restatement of Agency, has adopted the test of control as determinative of whether an individual is an employer or an independent contractor. A better test, suggested by Professor Mechem in his *Outlines of Agency* is:

13 Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(a), 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. V, 1964).

14 International Bhd. of Teamsters (the *Lohman Sales* case), 132 N.L.R.B. 901, 907 (1961).

15 Joint Council of Teamsters (the *Arden Farms* case), 141 N.L.R.B. 341 (1963), *aff'd*, NLRB v. Joint Council of Teamsters, 338 F.2d 23 (9th Cir. 1964).

16 377 U.S. 46 (1964).

17 *Id.* at 55.

18 Actual production includes all steps which lead to readiness for putting goods into the stream of commerce. *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 503 (1945). Fringe production covers only closely related processes or occupations directly essential to the production of goods.

19 362 U.S. 310 (1960).

20 *Id.* at 321. See also *Mitchell v. Vollmer & Co.*, 349 U.S. 427 (1955).

21 358 U.S. 207 (1959).

was the individual carrying on what, according to the habits of the locality, would be thought by a reasonable man as rising to the dignity of a trade or profession, and was he hired by the contractor to do a job for him under circumstances which could fairly be regarded as suggesting that the contractor intended only to contract for achieving a result and did not mean to dictate the methods or to control the doing of the job?²²

E. *Cease Doing Business Clause*: The second type of agreement prohibited by Section 8(e) is that whereby an employer agrees "to cease doing business with any other person." The major issue here is whether this language covers a clause in which the employer agrees to refrain from doing business with other persons who at the time of the agreement are not existing persons identified in the minds of the parties. There is no decision by the Board on this point. The issue was raised but left open by the Board in *Arden Farms Co.*²³ However, both the District Court and the Court of Appeals discussed the issue.²⁴ The District Court Judge commented:

Without the necessity of here defining the difference between "cease" and "refrain," it is enough to note that there is a difference, by the inclusion of both phrases in one clause and of only one in the second clause. It appears clear that the omission of the word "refrain" was a considered omission, and this Court will not subvert whatever reason for such an omission may have been.²⁵

When this case reached the Court of Appeals by way of the enforcement proceedings, the Court rejected the above view and found that the "refrain" clause would be covered "by the cease doing business" clause. The Court reasoned (1) that the words "cease" and "refrain" have the same meaning, (2) that, even if they are different, Congress treated them as the same, (3) that Congress might have left the word out by mistake and the Court would correct this mistake by interpreting "cease" to include "refrain," and (4) that the clause was intended to be a catchall.²⁶ However, this reasoning fails under close scrutiny.

Webster's New International Dictionary defines "cease" as "to come to an end; to stop; to leave off or give over; desist" and defines "refrain" as "to hold back; to restrain; to check."²⁷ The Board in *Centlivre Village Apartments*²⁸ held that the "cease doing business" language of Section 8(b)(4)(B) covered only clauses aimed at existing identified subcontractors.²⁹ Thus, a refrain clause could be enforced without violating Section 8(b)(4)(B). Section 8(e) was meant to fill a loophole in Section 8(b)(4)(B) and not to broaden its coverage.

22 MECHEM, OUTLINES OF AGENCY § 431 (4th ed. 1952). RESTATEMENT, AGENCY § 220 (1) (1958) states: "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

23 Joint Council of Teamsters (the *Arden Farms* case), 141 N.L.R.B. 341 (1963).

24 NLRB v. Joint Council of Teamsters, 338 F.2d 23 (9th Cir. 1964); *Hoffman v. Joint Council of Teamsters*, 230 F. Supp. 684 (N.D. Cal. 1962) (injunction proceeding). Since this was an enforcement proceeding and since the Board had not specifically passed on the point, the Circuit Court's decision could be considered dictum.

25 *Hoffman v. Joint Council of Teamsters*, *supra* note 24, at 691.

26 NLRB v. Joint Council of Teamsters, 338 F.2d 23, 27 (9th Cir. 1964).

27 WEBSTER, NEW INTERNATIONAL DICTIONARY 429, 2094 (2d. ed. 1960).

28 *Northeastern Indiana Bldg. Trades Council* (the *Centlivre Village Apartments* case), 1964 CCH LAB. L. REP. ¶ 13386 (Sept. 4, 1964).

29 *Id.* at 21415.

By construing Section 8(e) and Section 8(b)(4)(B) in harmony, "cease" in both sections must be given the same meaning and should not be made to include "refrain."

This conclusion is supported by legislative history. Section 8(e) was first proposed by Senator Gore³⁰ and was applicable only to motor carriers. His proposal read:

It shall be an unfair labor practice for any labor organization and any employer who is a common carrier . . . to enter into any contract . . . expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain, from handling or transporting any products of any other employer.

Senator Gore, after agreeing to a suggestion by Senator McClellan to include the term "cease doing business," restated his amendment:

The purpose of the amendment is to declare and make it "an unfair labor practice for any labor organization and any employer who is a common carrier . . . to enter into any contract or agreement, expressed or implied, whereby such employer ceases or refrains, or agrees to cease or refrain, from handling, using, or transporting any of the products of any other employer, or to cease doing, or *refrain from doing, business with same.*"³¹

Thus, the bill as introduced included the phrase "refrain from doing." In the final print of the bill as passed by the Senate, this was deleted.³² The omission of a word in a parallel clause indicates that the word was consciously dropped and that the clauses should be interpreted differently.³³ It is unlikely, as the Court indicates, that the word was dropped by mistake. These clauses were fought over bitterly and each addition or deletion of a word was a battle in itself. Also, this argument overlooks the fact that both sides were represented by some of the best labor lawyers in the country³⁴ who would not be likely to overlook such an omission. While legislative history is silent on the reason for the omission, two possible reasons stand out. First, the activities of the Teamsters concerned Congress in enacting this bill and are adequately covered. By a broad reading of "products," most clauses would come within Section 8(e). The few remaining could have been thought by Congress not to have such a substantial impact upon commerce as to warrant coverage. Second, unlike the "cease" clause, a "refrain" clause does not disturb the status quo or work any hardship on a neutral party since, at most, he loses only an expectancy of business.

The final objection that the "cease doing business" clause was meant to be a catchall ignores the fact that the "cease doing business" clause is broader than the "handling products" clause in that (1) it includes all forms of service

30 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1161 (1959).

31 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1163 (1959). (Emphasis added.)

32 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 582 (1959).

33 See DICKERSON, LEGISLATIVE DRAFTING § 6.2(d) (1954).

34 Included in this group were Archibald Cox, David Cole, Guy Farmer, Arthur Goldberg, Charles Gregory, Denison Kitchel, Plato Papps, Gerald Reilley, Louis Sherman, Benjamin Aaron, Russell Smith, George Taylor and Willard Wirtz. Many other lawyers advised individual Senators.

industries and (2) it includes nonstatutory employers, and possibly their own employees. This dissimilarity in coverage would indicate that the clauses are alternatives, rather than that one serves as a catchall for the other.

F. *The Provisos*: Not all clauses that come within the two proscriptive clauses of Section 8(e) are prohibited. Two industries are specifically exempted in whole or in part by this proviso to Section 8(e):

Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.³⁵

In the proviso, Congress specially excepted garment and construction industries. It could be, and has been, argued that this was an arbitrary classification prohibited by the Fifth Amendment. It is well settled that Congress may discriminate within a class if such a discrimination is reasonable.³⁶ Unlike other industries, both excepted industries operate through subcontractors and are thoroughly integrated.³⁷ Thus, this exception evidenced an awareness of an economic pattern not present in other industries and cannot be said to be arbitrary or unreasonable.

Congress granted the garment industry an immunity from both Section 8(e) and Section 8(b)(4)(B). Because of this broad immunity, there have been few problems and, consequently, little law has developed. On the other hand, only a limited exception was granted the construction industry. To understand the need for and the operation of this proviso, it is necessary to have a knowledge of the construction industry. When construction begins, a skeleton force is hired by the general contractor and his subcontractors. While the skeleton crew remains throughout the course of the project, employment for each craft varies according to the stage of construction. Because of this, the work force is sporadic and mobile. This militates against maintenance of more than a skeleton force of permanent employees by the general contractor.

Historically, if the contractor heads a large concern, he draws craftsmen as needed from their respective unions' exclusive hiring halls which consist of pools of skilled employees.³⁸ This allows the contractor to have a ready source

35 Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 704(b), 73 Stat. 543 (1959), 29 U.S.C. § 158 (Supp. V, 1964).

36 *Curran v. Wallace*, 306 U.S. 1 (1939).

37 *Lunden, Subcontracting Clauses in Major Contracts*, 84 MONTHLY LABOR REV. 715 (1961).

38 See, e.g., *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 672 (1961).

of manpower at a known price. The business agent can dispatch the necessary craftsmen as needed, and when they are not needed, they return to the hall to await their next call. For the union to maintain such a system, it must ensure that all jobs within its jurisdiction are held by employees referred by them.

For the employee, jobs are of short duration. The craftsman must wander from job to job and from employer to employer. Direct employment is rare and he normally will be employed by a number of different contractors on different projects during the course of a single season. The employee usually belongs to the union, which acts as his referral agency for jobs to be performed with his skills at a relatively uniform rate. Thus, the constant in a craftsman's life is not the employer but the local which provides him employment opportunities. Thus, employees in this industry have been organized along craft lines without regard to the project or to the particular employer involved and it is the work performed that determines his collective-bargaining representative. In 1959, Congress, recognizing that labor relations must be realistically administered and appreciating the plight of craft unions in the building and construction industry, approved exclusive hiring by enacting Section 8(f) of the Labor Management Reporting and Disclosure Act.³⁹

The construction industry is built up on the subcontracting of work which is the rule and not the exception. It is uneconomical for a general contractor to assemble and maintain the special equipment and specialized personnel needed for a particular job. Typically, the general contractor bids on and secures an overall project and then subcontracts for various specialties.⁴⁰ The work which the subcontractor performs is intimately connected with the work of a general contractor, but the general contractor has overall responsibility for the project. Because of this responsibility, it is standard practice for the general contractor to require his subcontractors to agree to be bound by the terms of the prime

³⁹ Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) § 705(a), 73 Stat. 545 (1959), 29 U.S.C. § 158 (Supp. V, 1964) reads in part:

It shall not be an unfair labor practice under subsection (a), and (b) of Section 8 for an employer primarily engaged in the building and construction industry to make an agreement covering employees engaged (or who, upon employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted . . .) because . . . (3) such agreement requires that the employer notify such labor organization of opportunities for employment with such employer or give such labor organization an opportunity to refer qualified applicants for such employment. . . .

⁴⁰ There are two types of contractors, the general contractor and the specialty contractor. The general contractor may construct the entire project or he may subcontract to a specialty contractor. The general contractor usually concentrates on a particular type of construction in a particular size project. The specialty contractor specializes on a single trade or on two or more related trades. The general contractor employs certain basic crafts such as carpenters, laborers, operating engineers, cement masons, etc. The specialty contractor employs only a certain specialty craft.

An exception to this division of general contractors and subcontractors is the large general contractor who operates throughout the nation. This contractor has a national agreement with the specialty crafts in which the unions agree to supply craftsmen directly to the contractor. The contractor agrees to pay the prevailing wage in the area in which he has a job, to recognize the jurisdictional claims of the union, and to hire only members of the union. This allows the general contractor to employ permanently an integrated supervisory force accustomed to certain methods and policies and to hire only craftsmen and foremen who will be supplied by the local of that union.

contract, general conditions, and specifications in the master labor agreement insofar as applicable to their work.⁴¹ Given this intimacy, unions in the construction industry have handled the representation of the subcontractor's employees by including such workmen within the bargaining unit covered by the contract with the general contractor. This has been done through a subcontracting clause.⁴²

Thus, in the construction industry, there is a great deal of vertical integration on the job site, with the work of one group of employees being immediately passed on to the next through the extensive use of subcontracting. The physical proximity between different groups of employees presents an opportunity for trouble if they cannot get along together. The purpose of the exemption was to prevent strife that might arise from union and nonunion people working together on a job site.

In order for a construction clause to come within the exemption, it must meet the exact terms of the proviso. Indeed, it has been suggested that a clause will only be exempted if it *contains the exact words* of the statute.⁴³ The proviso, while exempting agreements which *relate to* construction work done on the job site, does not give a specific formula to be used. There are several reasons for not following an "exact language" approach. First, a mechanical *per se* approach to labor relations has been rejected by both the courts and the Board in dealing with lawfulness of labor contracts.⁴⁴ Second, the Board in *Paragon Products Corp.*⁴⁵ and *Stackhouse Oldsmobile*⁴⁶ held that where a contract was not unlawful on its face, it would be interpreted to require no more than what is allowed by law and the clause need not reflect the precise language of the statute. The Board has relied on *NLRB v. News Syndicate Co.*⁴⁷ where the Supreme Court approved a lower court holding that "in the absence of provision calling explicitly for illegal conduct, the contract cannot be illegal because it fails to affirmatively disclaim all illegal objects." Third, if a clause is ambiguous, the Board in a Section 8(e) proceeding will not presume unlawfulness absent substantially evidence,⁴⁸ but will consider extrinsic evidence to determine whether the clause was lawfully administered.⁴⁹ The Board will consider the language used, the intent of the party, and the coverage of the clause. Finally, the Board in other cases has upheld the legality of clauses which do not contain the specific language of the statute, even though it did not specifically discuss

41 PARKER & ADAMS, THE AIA STANDARD CONTRACT FORM AND THE LAW 52 (1954).

42 See generally, Note, *The Nature of the Construction Industry*, 60 YALE L.J. 673 (1951). In the construction industry, subcontracting is generally accepted by the union and the employers as a normal condition of work. Few provisions are found that attempt to preserve job opportunities by limiting subcontracting. Lunden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LABOR REV. 715 (1961).

43 International Bhd. of Elec. Workers (the *Ets-Hokin Corp.* case), Case No. 28-CE-3 (1964) (Trial Examiner's decision).

44 See, e.g., *Paragon Products Corp.*, 134 N.L.R.B. 662 (1961).

45 *Id.* at 666.

46 140 N.L.R.B. 1239, 1241 (1963).

47 365 U.S. 695 (1961).

48 *Milk Drivers Union* (the *Minnesota Milk Co.* case), 133 N.L.R.B. 1314 (1961).

49 *Ohio Valley Carpenters Dist. Council* (the *Cardinal Industries* case), 136 N.L.R.B. 977, 986 (1962).

this problem.⁵⁰ Some things which the Board might look to in arriving at the nature of the clause are (1) the type of work the union has performed in the past, (2) the work description found in the present contract, (3) the type of work the employer is now engaged in, and (4) the intent of the parties.

While the construction clause probably does not have to include the proviso, it still must satisfy the statute. The first requirement is that the employer be in the construction industry. In *Falstaff Brewing Corp.*,⁵¹ the Board held that an employer who runs a brewery was not one in the construction industry. This result was reached in the *Kroger* case involving the operator of a chain of retail stores.⁵² How far the Board is willing to go in this direction is uncertain. Since in the *Kroger* case the operator of the retail store did not contract directly with the building contractor, but only leased the property from a realtor who did the actual contracting, the issue of whether a contractor who has no employees of his own is an employer in the construction industry remains to be met.⁵³ However, since the proviso applies not only to the subcontracting of work but also to the contracting of work, it would seem that a contracting employer could contract out the work and still come within the protection of the statute even though he has no employees of his own.

The most troublesome requirement to date has been that the work be done at the job site. The Board maintains that a contract dealing with work that is not to be performed at the construction site is not within the protection of the proviso.⁵⁴ The fact that the work could be done at the construction site is irrelevant for purposes of the construction proviso.⁵⁵ This is in conformity with the purpose of the statute which is to prevent on-site trouble among groups of employees. There are two types of clauses which might be of concern to the Board under this section: a transportation clause and a picket line clause. The validity of the transportation clause should depend on where the transportation occurs. If it occurs at the site alone, it should come within the purpose of the clause; if it occurs almost completely off the site, it should be invalid; and if the transportation occurs substantially both on and off the site, then it should be invalid only to the extent to which it applies away from the job site.⁵⁶ A picket line clause is one which grants immunity to individual employees who refuse to cross a picket line of another employer. If the employees

50 International Union of Operating Eng'rs (the *Schedell Contractor* case), 145 N.L.R.B. 351 (1963); Local 825, Int'l Union of Operating Eng'rs (the *Nichols Elec. Co.* case), 138 N.L.R.B. 540 (1962).

51 Local 585, Bhd. of Painters (the *Falstaff Brewing Corp.* case), 144 N.L.R.B. 100 (1963).

52 Columbus Bldg. Council (the *Kroger Co.* case), 1964 CCH LAB. L. REP. ¶ 13605 (Nov. 30, 1964).

53 See Carl Leipzeig (the *General Motors Corp.* case), 1964 CCH LAB. L. REP. ¶ 13564 (Nov. 17, 1964).

54 Cement Masons' Union (the *Interstate Employers* case), 1964 CCH LAB. L. REP. ¶ 13597 (Nov. 30, 1964).

55 Ohio Valley Carpenters Dist. Council (the *Cardinal Industries* case), 136 N.L.R.B. 977 (1962). However, this fact would be important in determining whether the scope of a work preservation clause in the construction industry is primary and excluded from the general prohibition of Section 8(e).

56 In Cement Masons' Union (the *Interstate Employers* case), 1964 CCH LAB. L. REP. ¶ 13597 (Nov. 30, 1964), the Board held a broad transportation clause invalid without making this distinction.

who refuse to cross the picket line are not themselves engaged in construction work on the job site, the construction proviso does not apply to them,⁵⁷ but if they are engaged in construction work along with those on the picket line, then it would seem permissible so long as the purpose of the picket line relates to the contracting or subcontracting of work. Since an agreement covering primary picket lines is exempt from Section 8(e),⁵⁸ the only protection that could be accorded a union would arise in cases involving a secondary picket line. However, in such a case the Board might find that the picket line is too remotely connected to contracting or subcontracting of work to afford protection.

Even if the clause does come within the proviso, the union might run into problems in obtaining or enforcing it. Section 8(b)(4)(A) prohibits the means for "forcing or requiring any employer . . . to enter into any agreement which is prohibited by subsection (c) of this Section." The Board originally took the position that a construction proviso clause was unlawful under 8(b)(4)(A).⁵⁹ The Board's approach was subsequently rejected by several Courts of Appeals⁶⁰ on the theory that the proviso to Section 8(e) is incorporated by reference into 8(b)(4)(A) and hence an attempt to obtain such a clause falls outside Section 8(b)(4)(A). In *Centlivre Village Apartments*⁶¹ the Board re-examined its approach and decided to defer to the Court's interpretation. It is still possible for the Board to find a violation if the contract contains other clauses that would be illegal under Section 8(e) and not exempted by the proviso thereto.

Even if coercion to obtain such a clause is not illegal under Section 8(b)(4)(A), there is no doubt that coercion to enforce such a clause would be a violation of Section 8(b)(4)(B), which reads:

Sec. 8

(b) It shall be an unfair labor practice for a labor organization or its agents —

(4)

(ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .

Coercion to enforce an executed contract proviso clause would cause a cession of a business relation under Section 8(b)(4)(B). The Section 8(e) proviso would not be of aid since it only authorizes *entering into*. This result is buttressed by the wording of the statute itself which specifically indicates that only

57 Cf. *Teamsters Union (the Connecticut Sand & Stone case)*, 138 N.L.R.B. 532 (1962).

58 *Truck Drivers Union v. NLRB*, 334 F.2d 539 (D.C. Cir. 1964).

59 *Construction Union (the Colson & Stevens case)*, 137 N.L.R.B. 1650 (1962).

60 See, e.g., *Orange Belt Dist. Council of Painters v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964).

61 *Northeastern Indiana Bldg. Council (the Centlivre Village Apartments case)*, 1964 CCH LAB. L. REP. ¶ 13386 (Sept. 4, 1964).

the garment industry⁶² is exempted from Section 8(b)(4)(B). The legislative history is clear that coercion to enforce such a clause would be a violation of the Act.

In *Centlivre Village Apartments*,⁶³ the Board had occasion to re-examine its Section 8(b)(4)(B) position set forth in *Colson and Stevens*.⁶⁴ The Board found that, on the facts of that case, respondents' picketing violated Section 8(b)(4)(i)(ii)(B) in that it had as one of its objects forcing or requiring Centlivre, the general contractor, to cease doing business with K & K, a carpentry subcontractor which had no agreement with the respondent council or its affiliated craft locals:

We are persuaded that picketing by a union in the construction industry to interrupt business relations between a neutral general contractor and an identified subcontractor constitutes a violation of Section 8(b)(4)(B) notwithstanding the fact that the picketing also has a lawful concurrent objective of securing a "hot cargo" agreement permitted by the proviso 8(e).

The court decisions in which we have acquiesced above state, and we agree, that under Section 8(b)(4)(B) lawful "hot cargo" clauses "may be enforced only through lawsuits, and not through economic action." If Respondents had had such a clause with Centlivre and pursuant thereto had, by picketing, sought to have Centlivre cease doing business with K & K, the picketing would have violated 8(b)(4)(B). No different result is called for because Respondents by their picketing seek simultaneously to obtain a lawful "hot cargo" clause and termination of business relations with a primary employer, K & K, rather than first the contract and then the termination. It is immaterial that one of the objects of the picketing was lawful, if another object was unlawful. "It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract."⁶⁵

While a union may not engage in unlawful action to enforce a construction proviso contract,⁶⁶ the question is what conduct comes within the prohibition of the Act. In the *Sand Door* case,⁶⁷ Mr. Justice Frankfurter declared:

It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have *legal radiations* affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited in § 8(b)(4)(A) [8(b)(4)(B)].⁶⁸

62 The difference in treatment is not explained in the statute, legislative history or the nature of the industry. This raises the question whether this is an unconstitutional classification. Since both industries are unique, it is unlikely that the United States Supreme Court will upset Congress' determination as to how they will be treated.

63 Northeastern Indiana Bldg. Council (the *Centlivre Village Apartments* case), 1964 CCH LAB. L. REP. 13386 (Sept. 4, 1964).

64 137 N.L.R.B. 1650 (1962).

65 Northeastern Indiana Bldg. Council (the *Centlivre Village Apartments* case), 1964 CCH LAB. L. REP. ¶ 13386 at 21415 (Sept. 4, 1964). The Board cited *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689 (1951).

66 Local 1976, United Bhd. of Carpenters v. NLRB (the *Sand Door Co.* case), 357 U.S. 93, 104-05 (1958).

67 *Ibid.*

68 *Id.* at 108. (Emphasis added.)

Thus, the Court indicated that the ultimate objective of the union was lawful adherence by the employer to the contractual provision. The only question left open to the Board was whether the particular method utilized was unlawful, *but only means precisely proscribed can be considered by the Board*. The parties are still free to resort to statutory and contractual remedies to bring pressure on the employer to conform to his legal obligation.

Section 8(b)(4)(B) allows an employer voluntarily to observe a construction proviso clause. The employer may in good conscience feel bound by an agreement freely entered into. The employer also may be in sympathy with a union objective such as the elimination of substandard working conditions which allow other employers more effectively to compete due to lower labor costs. He may even comply with the union's request in the hope that it will result in concessions from the union at the next bargaining session. These are all legitimate reasons which the employer may consider in running his business. The union may urge that these factors be weighed by the employer in making his decision so long as it does not use prohibited pressure and the employer may respond favorably to such pressure without violating the Act.⁶⁹ Of course, the Board must decide whether the choice was entirely voluntary or was the result of some hidden coercion.

The union also may bring a lawsuit judicially to enforce its contract. The courts have held that such action does not constitute coercion for the purpose of Section 8(b)(4)(B) and will grant the union traditional remedies, such as specific performance, in order to obtain compliance by the employer.⁷⁰ The next question, therefore, is whether the parties may provide a contractual remedy which obviates the need for court enforcement.

Most contracts provide some form of grievance and arbitration procedure by which the employer may take the issue of his alleged violation of the construction proviso clause to an arbitrator. It is fairly clear that arbitrators have the right to review the issue of legality of the contract's terms,⁷¹ even though the subject of the dispute might also be an unfair labor practice under Section 8(b)(4).⁷² The Board, in *United Artists Theatre Circuit, Inc.*,⁷³ deferred to the interpretation given the contract clause by the arbitrator and found that the clause was not violative of Section 8(e).⁷⁴ In *Spielberg Manufacturing Company*⁷⁵ the Board stated that it would accept an arbitrator's award if (1) the arbitration proceeding was fair and regular, (2) all parties had agreed to be bound, and (3) the decision of the arbitration panel was not clearly repugnant to the purposes of the Act.⁷⁶ Only the last *Spielberg* requirement would be in issue here. The Board has not clarified what is meant by this, but

69 *United Slate Roofers Union (the Atlas Roofing Co. case)*, 134 N.L.R.B. 367 (1961).

70 *Local 48, Sheet Metal Workers v. Hardy Corp.*, 322 F.2d 682 (5th Cir. 1964).

71 *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

72 *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964) (involving Section 8(b)(4)(B)).

73 *Service Union (the United Artists Theatre Circuit, Inc. case)*, 1964 CCH LAB. L. REP. ¶ 13418 (Sept. 14, 1964).

74 *Id.* at 21500.

75 112 N.L.R.B. 1080 (1955).

76 *Id.* at 1082.

a study of the cases indicates that the arbitrator's determination of both fact and law will stand unless it is expressly covered by statute. If this is so, then we must ask whether enforcement of such a clause is expressly prohibited by the law. In view of the fact that a court will enforce this type of clause,⁷⁷ specific enforcement by an arbitrator should not be considered illicit coercion by the Board and should be honored.

Accordingly, then, it might be argued that other forms of contractual enforcement should be honored. Such a contract clause providing for self-enforcement is a termination clause which gives the union, in addition to other rights and remedies, the right to terminate or rescind the contract upon its breach. As noted by the Board in *Amalgamated Lithographers, Local 78* (the *Miami Post* case),⁷⁸ the "right to terminate" clause is intended to give the union a remedy for breach of another clause, and its validity will depend on the validity of the other clause. Since the construction proviso clause is lawful, a clause which is intended to implement it is lawful also.⁷⁹ If the clauses cannot be actually implemented, their validity standing alone is meaningless. Since rescission is a normal contractual remedy and constitutes no greater form of coercion than specific performance, it cannot be said that the union has used unlawful means prohibited by Section 8(b)(4)(B).

The problem of enforcement of subcontracting clauses is also reflected in other sections of the Act. In *Northern California Chapter, Associated General Contractors*⁸⁰ the Board held that the enforcement of a union signatory clause (which required that the terms and conditions of the prime contract be applied to all subcontractors) to *disrupt* an existing relationship by forcing the cancellation of a contract between the general contractor and a subcontractor, even though entered into in violation of such clause, was a violation of Section 8(a)(1), (2) and (3) by the employer as to the employees of the subcontractor who were deprived of their work because of the cancellation, and Section 8(b)(1)(A) and (2) by the union, but that the enforcement of such a clause to *prevent* entering into such a relationship was not a violation of the above sections of the Act. The first and only case after the passage of Section 8(e) to deal with this problem was *Burt Mfg. Co.*⁸¹ The Board held that the union, by attempting to cause a manufacturer of sheet metal used on construction job sites to sign a union security agreement even though his employees were not represented by it, violated Section 8(b)(2) and the fact that it might also have been seeking to enforce a "union-only" subcontracting clause was no defense. It should be noted that the type of clause being enforced falls within the general proscription of Section 8(e). In the *Burt Mfg.* case, the Board considered the construction proviso to Section 8(e) but held that it was inapplicable since the work in question did not occur at the job site. The Board did not discuss what effect a holding that a clause was within the proviso

77 *Local 48, Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964).

78 130 N.L.R.B. 968 (1961).

79 *Id.* at 977.

80 *The St. Maurice, Helmkamp & Musser case*, 119 N.L.R.B. 1026 (1958), *enfd.*, 266 F.2d 905 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 839 (1959).

81 *Sheet Metal Workers Ass'n (the Burt Mfg. Co. case)*, 127 N.L.R.B. 1629 (1960), *enfd.*

would have but the tone of the decision indicated that it would result in a dismissal of the charge, which would be supported by the fact that such a clause is enforceable in spite of Section 8(b)(4)(B).⁸²

Even if a clause is not within the protection of Section 8(b)(4)(B) or 8(e), if the alleged discrimination is caused by a jurisdictional dispute, the Board will not consider the alleged discrimination until it has settled the jurisdictional dispute.⁸³ But if the union is not seeking only the work, but is in fact trying to organize the employees of the subcontractor by putting pressure on the general contractor, then it will violate Section 8(b)(1)(A) and Section 8(b)(2) if it succeeds,⁸⁴ and the conduct itself might violate Sections 8(b)(4)(C) and 8(b)(7) of the Act. Hence, if a dispute involves a work assignment and is not exempted from the general proscription of Section 8(e) by reason of either the nature of the clause or the construction proviso, and if a Section 10(k) hearing has been held, only then may the Board proceed to the underlying reasons enunciated in the *Associated General Contractors* case.

Section 8(a)(3) makes it an unfair labor practice for an employer, by discrimination in regard to any term or condition of employment, to encourage or discourage membership in a labor organization. In order to show discrimination, two elements must be present: (1) employer and employees, and (2) discrimination. In the *Associated General Contractors* case, there was a three-way split with no view commanding a majority as to the first element. While all seemed to agree that an employment relationship exists when a person has the power to effectuate the terms and conditions of employment in question, they disagreed as to what constituted control. The three member majority found that a general contractor had sufficient control over the subcontractor's employees solely because of this relationship since by terminating the contract the general contractor effectively terminates the employment of the employees of the subcontractor. The two-member dissent rejected this approach and held that (1) there had to be actual control over the terms and conditions of employment⁸⁵ and not just the power to terminate; and (2) since the union had the right to enter into a contract boycotting nonunion contractors, it should have the right to enforce their agreement, not only before the relationship is entered into, but after a relationship is entered into in violation of the contract and without the union's consent.⁸⁶

The dissent presents the more defensible position. As noted by Mechem, an employee remains presumptively in the service of his general employer, the subcontractor, unless it can be affirmatively shown that in fact his allegiance

in part, 293 F.2d 141 (D.C. Cir. 1961), cert. denied, 368 U.S. 896 (1961).

⁸² Local 48, Sheet Metal Workers v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964).

⁸³ Local 502, Int'l Hod Carriers Union (the *Cement Work Corp.* case), 140 N.L.R.B. 694 (1963).

⁸⁴ See *ILGWU v. NLRB*, 366 U.S. 731 (1962); *Operative Plasterers' Ass'n (the Arnold M. Hansen case)*, 1964 CCH LAB. L. REP. ¶ 13607 (Nov. 30, 1964).

⁸⁵ See *Moore Drop Forging Co.*, 144 N.L.R.B. 165 (1963) and *Hurd Corp.*, 143 N.L.R.B. 306 (1963) where there was actual participation by the general contractor in the discrimination.

⁸⁶ In *Local 911, Int'l Bhd. of Teamsters (the Wand Corp. case)*, 122 N.L.R.B. 499, 502-03 (1958), Member Fanning, in his dissent, felt that point 2 was buttressed by the United States Supreme Court's holding in the *Sand Door* case, 357 U.S. 93 (1958).

has been transferred to the special employer, the general contractor.⁸⁷ Such a transfer of allegiance exists where the special employer, the general contractor, may in practice or by terms of the agreement or both actually exercise control over the servant as to make him seem the real master. Power to terminate the contract alone would not be the type of control thought sufficient to change this relationship. Since the contract can be lawfully entered into, it can be lawfully enforced,⁸⁸ and can lawfully bring about cancellation of the relationship and subsequent termination of employment of the subcontractor's employees on the project. The fact that the parties might use means illegal under Section 8(b)(4)(B) should have no bearing on their seeking a lawful object under Sections 8(b)(2) or 8(a)(3).

II. Clauses Not Within the Purpose of Section 8(e)

The plain meaning of the language is that all clauses except those exempt by the provisos fall within the scope of its language and are prohibited by Section 8(e). Therefore, if this section is read literally, it could cover all subcontracting clauses not exempt by the provisos. Did Congress intend such a result? One Congressman thought it did.⁸⁹ However, as noted by the Supreme Court in *NLRB v. Fruit and Vegetable Packers*:⁹⁰

[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. "The fears and doubts of the opposition are no authoritative guides to the construction of legislation. It is the sponsors that we look to when the meaning of statutory words is in doubt." . . . The silence of the sponsors of amendments is pregnant with significance. . . .⁹¹

Since Congress did not discuss the types of clauses to be allowed and the reasons for their allowance, legislative history, so far as direct reference is concerned, is of little value. However, what types of subcontracting clauses are to be exempted from Section 8(e) can be ascertained indirectly from what prompted Congress to enact this section. Both its wording and legislative history indicate that the main concern of Congress was to close the "*Sand Door*" loophole to Section 8(b)(4)(B) which was thought to allow a union and employer to agree in a contract to do what Section 8(b)(4)(B) prohibited a union from forcing an employer to do absent an agreement.⁹² Congress intended the new section to be interpreted in harmony with the developed law under Section 8(b)(4)(B).⁹³ This is strengthened by the fact that both sections, by utilizing almost identical language, proscribe the same object.

87 MECHEM, OUTLINES OF AGENCY § 466 (4th ed. 1952).

88 See Local 48, Sheet Metal Workers v. Hardy Corp., 332 F.2d 682 (5th Cir. 1964).

89 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1428, 1430 (1959).

90 377 U.S. 58 (1964).

91 *Id.* at 66 (referring to Senators Morse and Humphrey as the "opposition," and Senators Goldwater and Dirksen as the "sponsors").

92 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 778-79 (1959).

93 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1575-76 (1959).

Section 8(b)(4)(B) was designed to prevent the unnecessary extension of disputes with an employer by confining the dispute to him and by limiting the amount of pressure a union may exert against a neutral employer because of his business relationship with the employer against whom the union has the dispute. Thus, this section is designed to accommodate the right of a union effectively to bring pressure on a primary employer with the right of a secondary employer to operate free from pressure directed at it to cease doing business with the primary employer. This section was not designed to shield secondary employers from all the adverse radiations flowing from a primary dispute. Normally, the secondary employer will be adversely affected if a wholly or partially successful strike occurs at the primary's plant since its business will be disrupted.⁹⁴

This primary-secondary dichotomy is reflected in the language of Section 8(e) which is cast in terms of "any *other* employer" and "any *other* person" demonstrating that Congress intended to place only contract clauses relating to secondary employers under its prohibition. The test of whether a clause is primary or secondary is similar to the test of whether a subject of bargaining is mandatory: the subject matter must settle a term or condition of employment of the employer's employees.⁹⁵ Under such a test a clause would be primary if directly aimed at the terms and conditions of employment of the employees in the unit and would be secondary if directly aimed at the terms and conditions of employment of employees outside the bargaining unit.⁹⁶ If a primary subcontracting clause causes a cessation of business, such effect is secondary. But so long as a clause is substantially free of secondary characteristics, it will be outside the proscription of Section 8(e).

In general, the Board has adopted the above approach. It has held that Section 8(e) does not bar all subcontracting agreements⁹⁷ and that Sections 8(e) and 8(b)(4)(B) must be construed in harmony.⁹⁸ In applying the above principles, the Board has proceeded on a case-by-case approach, examining the language used, the intent of the parties, and the scope of the restriction embodied in the clause.⁹⁹ If the words of the clause in question match the language in the statute, the clause must fall within the proscription of Section 8(e) and how the clause is enforced by the parties is irrelevant.¹⁰⁰ However, it should be noted that most clauses are not this clear so that the Board is forced to take extensive evidence to determine whether the object of the clause is directed at the employment conditions of the employees in the bargaining unit. In such circumstances the Board will look to (1) the scope of the bar-

94 Local 3, Int'l Bhd. of Elec. Workers (the *New Power Wire Corp.* case), 144 N.L.R.B. 1089 (1963).

95 Houston Chapter, Associated Gen. Contractors, 143 N.L.R.B. 409 (1963).

96 Operative Plasterers' Ass'n (the *Arnold M. Hansen* case), 1964 CCH LAB. L. REP. ¶ 13607 (Nov. 30, 1964); So. Cal. Dist. Council of Hod Carriers (the *Golding and Jones, Inc.* case), 144 N.L.R.B. 978 (1963).

97 Milk Drivers Union (the *Minnesota Milk Co.* case), 133 N.L.R.B. 1314, 1316 (1961); Ohio Valley Carpenters Dist. Council (the *Cardinal Industries* case), 136 N.L.R.B. 977, 984-86 (1962).

98 See text accompanying notes 27-34 *supra*.

99 Milk Drivers Union (the *Minnesota Milk Co.* case), 133 N.L.R.B. 1314, 1317 (1961).

100 Truck Drivers Union (the *Patton Warehouse* case), 140 N.L.R.B. 1474 (1963), *enfd.*, 334 F.2d 539 (D.C. Cir. 1964).

gaining unit; (2) the object of the clause; (3) the extent to which the union also represents employees outside the bargaining unit covered by the contract; (4) the extent to which any person, firm, or corporation whose employees are not represented by the union which is in competition with unit members of the union observes and causes its employees to observe substantially the same conditions of employment as those observed by the employer; (5) the extent to which both parties, in agreeing to the clause, understood and acquiesced in a secondary object; and (6) the extent to which secondary consequences within Section 8(e)'s intendment would probably flow from the provision, in view of the economic history, the circumstances of the industry, the locality, and the parties.¹⁰¹

If, after the above analysis, the Board still considers the clause ambiguous and susceptible to various interpretations, it will find the clause unlawful only to the extent to which it can be interpreted unlawfully.¹⁰² In order to prevent the parties from creating ambiguities where they do not exist merely to avoid the impact of the Act, the Board is careful that there is ambiguity both in the language of the clause and the intent of parties. The Board will accept the interpretation of an arbitrator as to the meaning of the clause.¹⁰³

If a clause is valid on its face, it can still be interpreted to be illegal. However, if the parties, intentionally or mistakenly, interpret a valid clause so as to encompass an illegal secondary object, then this interpretation, but not the valid clause, will be held to constitute an illegal clause under 8(e).¹⁰⁴

III. Specific Types of Clauses

A. Introduction

More than 75 per cent of the major contracts in America contain no direct reference to subcontracting.¹⁰⁵ Despite this absence, there are implied restrictions on subcontracting. In *Fibreboard Paper Products v. NLRB*,¹⁰⁶ the Supreme Court held that an employer must bargain about subcontracting.¹⁰⁷ However, this does not alleviate, in any real sense, the union's concern for job security since once the employer has discussed his intention in good faith with the union to an impasse, it may proceed to subcontract.

Because of this inadequacy, unions have sought relief by bargaining for no-subcontracting clauses in their contracts. The Board has held that a clause which forbids all subcontracting is legal as a legitimate device to protect the economic integrity of the bargaining unit.¹⁰⁸ Since an absolute ban on subcontracting is seldom seen in collective bargaining contracts, it has had little

101 *Carnation Co.*, case No. 21-CE-33 (1964) (Order re-opening the record).

102 *Truck Drivers Union (the Freeto Constr. Co. case)*, 1964 CCH LAB. L. REP. ¶ 13491 (Oct. 20, 1964).

103 *Service Employees' Union (the United Artists Theatre Circuit case)*, 1964 CCH LAB. L. REP. ¶ 13418 (Sept. 14, 1964).

104 *Milk Drivers Union (the Sidney Wanzer case)*, 141 N.L.R.B. 1237, 1242 (1963).

105 *Lunden*, *supra* note 37, at 581-82.

106 379 U.S. 203 (1964).

107 *Id.* at 215.

108 *Ohio Valley Carpenters Dist. Council (the Cardinal Industries case)*, 136 N.L.R.B. 977 (1962). *Service Employees' Union (the United Artists Theatre Circuit case)*, 1964 CCH LAB. L. REP. ¶ 13418 (Sept. 14, 1964).

impact on labor relations.¹⁰⁹ The reason behind the infrequency of such clauses is that they would be valuable in only a limited number of situations. It would not be practical where an industry is integrated, or where the volume of business fluctuates. In such circumstances, it would be financially impossible for the employer not to subcontract.

Many subcontracting clauses allow subcontracting in cases of emergency and where the employer does not have the equipment or the manpower to perform a given job.¹¹⁰ There is no problem as to the emergency exception since a one-time subcontract of a limited duration is unlikely to have substantial impact on the bargaining unit. The reason behind allowing the employer to subcontract where there is a shortage of equipment or manpower is that it does not force the employer to acquire new facilities which will not be used most of the time or to hire additional employees who will be laid off in a few days.

Beyond this point, the unions' attitudes stiffen and a number of contract clauses¹¹¹ bar subcontracting either when employees are on layoff or part-time work or when subcontracting would cause layoffs in part-time work. The same result can be achieved indirectly by allowing the employer to subcontract under certain circumstances but providing that an amount equal to that paid the subcontractor will be paid to the employees on layoff or part-time who otherwise would have performed the work. Such a clause acts as a combined work preservation clause and a guaranteed wage.

Examples of the type of clause forbidden by Section 8(e) are the "union only" and the "union preference" clauses. In the "union only" clause, the contracting employer is allowed to subcontract to any union employer or an employer having a contract with a specific type of union. If the clause allows subcontracting out work which could be done by the unit employees, then the removal of such work provides no benefit to them and is clearly secondary. If the work could not be done by the employer except at additional expense, the removal is not of direct benefit to the contracting unit, but rather contributes to the unionization of employees generally which might indirectly benefit the employees in the unit.¹¹² As for clauses requiring the employer to give "preference" to union firms, the court in *District 9, IAM v. NLRB*¹¹³ held that such a clause is illegal because, where both union and non-union firms are available, it forces an employer to cease doing business with non-union employers and hence is unlawful for the reasons given above.¹¹⁴ In order to circumvent these holdings, unions have attempted to secure clauses which provide that there will be no subcontracting at all without prior union approval. It is likely that such

109 Lunden, *supra* note 37, at 581.

110 *Id.* at 579-80.

111 *Id.* at 579.

112 In *Joint Council of Teamsters (the Arden Farms case)*, 141 N.L.R.B. 341 (1963), the reverse situation occurred and the Board held invalid a clause which would have actually prohibited all subcontracting except to specified *nonunion* contractors because it represented an agreement whereby an employer agrees to cease doing business with another.

113 315 F.2d 33 (D.C. Cir. 1962).

114 *Id.* at 36-37.

a clause would be bad because it bears only a tenuous relation to the protection of the employees in the bargaining unit and is too susceptible to abuse.

B. *Work Preservation Clauses*

In *Fibreboard Paper Products v. NLRB*,¹¹⁵ the Supreme Court held that contracting-out of work being performed by employees in an existing bargaining unit is a mandatory subject of bargaining.¹¹⁶ The aim of work preservation clauses is to regulate working conditions within the plant of the contracting employer by maintaining jobs for the employees in the bargaining unit. This type of clause protects the legitimate self-interest of the employees by tending to stabilize the work distribution and by protecting and preserving the status quo, thus eliminating unemployment and readjustment for these employees. The object of allowing unit employees to do traditional work is primary activity and any adverse effects on neutral employers are purely incidental. Since the union has no dispute with the secondary or neutral employers, the purpose of the clause cannot be to harm such secondary employer because his labor policies are objectionable, or to force him to change his labor policies. Also, since the contracting employer is already doing the work, the secondary employer is not deprived of work he has done in the past, but is merely denied an opportunity to acquire new work.

In *Meat and Highway Drivers Local 710 v. NLRB*,¹¹⁷ the Court of Appeals went one step further and held that if jobs are "fairly claimable" by the unit, they may be protected by a "no-subcontracting" clause even though the unit is not performing the work at this time.¹¹⁸ This is commonly known as a *work assignment* clause. Such a clause prohibits the subcontracting of work where the unit employees are capable of performing and have in the past performed such work or, if new work is involved, it is related to their present or past work. The primary purpose of such a clause is to provide the additional protection incidental to doing more work.

The Board has held that activity to require the employer to observe the work-assignment provisions of a contract is primary activity exempt from Section 8(b)(4)(B).¹¹⁹ Obviously, the clause itself must be a primary clause exempt from Section 8(e) and the Board has so held. In *Cardinal Industries, Inc.*,¹²⁰ the Board adopted the following statement of a Trial Examiner:

Whether defined in terms of "contract coverage" or "appropriate unit" or "union work jurisdiction," the delineation and exclusive assignment to employees in a contract unit of specified work tasks cannot itself be regarded as unlawful. . . . In Section 10(k) cases, the Board has long upheld as valid the preemption by contract of

115 379 U.S. 203 (1964).

116 *Id.* at 209-15.

117 335 F.2d 709 (D.C. Cir. 1964).

118 *Id.* at 713.

119 International Longshoremen's Union (the *Pacific Maritime Ass'n* case), 137 N.L.R.B. 119 (1962).

120 Ohio Valley Carpenters Dist. Council (the *Cardinal Industries* case), 136 N.L.R.B. 977 (1962).

assigned work jurisdiction to members of a particular craft, and has ruled strike action to enforce such contractually granted work jurisdictional rights not violative of Section 8(b)(4)(D).¹²¹

The cite to Section 8(b)(4)(D) is most apt. In *NLRB v. Radio and Television Broadcast Engineers Union*,¹²² the Supreme Court held that the Board could, under Section 10(k), make an assignment to a union of work which was assigned and being done by another group of employees.¹²³ Since that case, the Board has assigned work contrary to the employer's assignment¹²⁴ and has considered a contract clause as a factor in deciding the dispute where such a clause is unambiguous.¹²⁵ Thus, under Section 8(b)(4)(D) and (B), a union can use primary methods to force an employer to take work away from one group of employees and assign it to another if this is done pursuant to a lawful work-clause.

In view of the above, it is not surprising that the Board, in *Charles B. Mahin*,¹²⁶ has held a work-assignment clause to be exempt from the prohibition of Section 8(e). However, such a clause can be used only to acquire work which is normally related to the past or present work of the employees. In determining what work can be acquired by such a clause, the Board might wish to use some of the criteria employed in a Section 10(k) assignment hearing, that is, (1) whether employees have performed the work in the past, (2) whether this work is substituted for work they have performed in the past, (3) whether other employees doing similar work in the area or industry have done this type of work, and (4) whether the employees in the bargaining unit possess the skills to do this type of work safely and efficiently.

If a work-assignment clause is valid, the fact that the union attempts to interpret the clause in an illegal manner has no bearing on the clause itself,¹²⁷ but coercion to obtain an illegal object will constitute a violation of Section 8(b)(4)(B). If the Board has already awarded the work in question to another union in a Section 10(k) hearing, no real claim can exist and the union coerces a contrary assignment. However, if the Section 10(k) award resolves a borderline situation after the dispute giving rise to a Section 8(b)(4)(B) complaint, such complaint will be dismissed.¹²⁸ If the employer does not have control over the assignment of the work, then an attempt to coerce him to change the assignment is in fact pressure levied against him as a secondary with the intention that this will coerce the primary. Such conduct is the typical activity

121 *Id.* at 985-86.

122 364 U.S. 573 (1961).

123 The Court affirmed the Appellate Court's refusal to enforce the Board's order.

124 *E.g.*, Local 68, Wood Lathers Union (the *Acoustics & Specialties, Inc.* case), 142 N.L.R.B. 1073 (1963); Local 499, IBEW (the *Iowa Power and Light Co.* case), 144 N.L.R.B. 870 (1963).

125 Local 585, Bhd. of Painters (the *Bishopric Products Co.* case), 140 N.L.R.B. 1304 (1963).

126 Metropolitan Dist. Council, United Bhd. of Carpenters (the *Charles B. Mahin* case), 1964 CCH LAB. L. REP. ¶ 13555 (Nov. 12, 1964).

127 See text accompanying note 104 *supra*.

128 New York Paper Cutters' Union (the *Automatic Sealing Service, Inc.* case), 1964 CCH LAB. L. REP. ¶ 13454 (Sept. 25, 1964).

proscribed by Section 8(b)(4)(B).¹²⁹ The theory behind this is that if the employer, in good faith, seeks the work for his men but cannot obtain it, he should not be penalized for accepting the work since the fact that he does accept the work will not result in any benefit to the unit members. On the other hand, if the employer does not honestly seek the work for his men but lets it go by default, the Board should dismiss the employer's complaint for lack of clean hands.¹³⁰

There are two other types of work preservation clauses which have received special attention by the Board: (1) prefabrication clauses and (2) multi-employer unit-work clauses. The prefabrication clause is simply a work-assignment clause in the construction industry. Such clauses have been in existence for many years, but due to the increase in recent years in the manufacturing and assembling of construction parts away from the construction site, a growing importance has been attached to them. So long as the union seeks to restrict the use of prefabricated materials by demanding that the work be done by it, its purpose is primary and will not come within the general proscription of Section 8(e).¹³¹ If the clause goes beyond this and allows subcontracting to a union firm off the site, it will be prohibited by Section 8(e)¹³² and is not exempted by the proviso.¹³³

The ordinary work preservation clause is between one employer and one union. The question arises as to whether a work preservation clause may be between a union and a multi-employer unit. In the *Bituminous Coal Operators* case,¹³⁴ the Board felt that a work preservation clause limiting work to employees in an appropriate multi-employer bargaining unit would be valid.¹³⁵ The chief point to note is that there must be an appropriate bargaining unit. The normal rule for establishing a multi-employer bargaining unit is that the participation of a group of employees, whether members or non-members of an association, either personally or through a representative, in joint bargaining session unequivocally manifest an intent to be bound by a group rather than individual action.¹³⁶ If the union allows subcontracting to outside employers on the basis of union considerations, the clause would be bad.¹³⁷ What if the union allows subcontracting of work to employers who are willing to become a party to the contract? There is court support for the contention that such a clause is illegal because it is being used to require firms to sign union contracts.¹³⁸ If each firm has a fixed permanent employee complement, the addition of another

129 Metropolitan Dist. Council, United Bhd. of Carpenters (the *Charles B. Mahin* case), 1964 CCH LAB. L. REP. ¶ 13555 (Nov. 12, 1964); United Ass'n of Journeymen and Apprentices of the Plumbing Industry (the *Arthur Venneri* case), 137 N.L.R.B. 828 (1962), *enfd.*, 321 F.2d 366, *cert. denied*, 375 U.S. 921 (1963).

130 In addition to the above, a union may not use secondary methods to enforce a clause. See note 129 *supra*.

131 Metropolitan Dist. Council, United Bhd. of Carpenters (the *Charles B. Mahin* case), 1964 CCH LAB. L. REP. ¶ 13555 at 21,810-11 (Nov. 12, 1964).

132 See text accompanying notes 112-13 *supra*.

133 See text accompanying notes 54-58 *supra*.

134 Raymond O. Lewis (the *Bituminous Coal Operators* case), 144 N.L.R.B. 228 (1963).

135 *Id.* at 236-37.

136 Morgan Linen Serv., Inc., 131 N.L.R.B. 420 (1961).

137 Raymond O. Lewis (the *Bituminous Coal Operators* case), 144 N.L.R.B. 228 (1963).

138 NLRB v. Joint Council of Teamsters, 338 F.2d 23 (9th Cir. 1964).

employer does not improve the employment condition of employees in the unit. However, if each employer has only a transient work force drawn from a pool of labor, the addition of other employers doing the same work would improve the working conditions of those in the labor pool¹³⁹ and maximize their job opportunities.

C. *Work Standard Clauses*

The United States Supreme Court, in *Local 24, Int'l Bhd. of Teamsters v. Oliver*,¹⁴⁰ held that conditions imposed on contracting-out to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a mandatory subject of bargaining.¹⁴¹ In *Meat and Highway Drivers Union v. NLRB*,¹⁴² the Court of Appeals for the District of Columbia inferred that a clause which restricted subcontracting to "any cartage company whose truckdrivers enjoy the same or greater wages and other benefits as provided in this agreement" may be lawful because such clause was a legitimate attempt by the union to protect and preserve the work and standards it had bargained for by removing the economic incentive for subcontracting thus preserving the work for the unit employees.¹⁴³

The prime purpose for the existence of the labor movement has been to better the working conditions of the entire working population. A union may be legitimately concerned that particular employers are undermining the area standards of employment by maintaining lower standards without being interested in organizing that employer.¹⁴⁴ If an employer were free to pay less than the contract standards, the cost savings would encourage him to subcontract as much as possible, thereby diminishing the amount of work available for the unit employees. To prohibit a labor union from protecting its members by removing this major incentive to subcontract work which would otherwise be done by the unit employees would tend to destroy the bargaining unit through loss of business or to force the primary employer to depress work standards in order to meet competition. A clause which permits the employer to subcontract unit work only to other employers adhering to contract standards equivalent to those established in the contract minimizes this danger. It also provides more flexibility to employers who must contract out to survive. Since there will be firms which can meet contract standards, such a clause will not be used as a device to gain recognition.

If the work standards clause goes beyond protecting the job opportunities of the bargaining unit employees, it is secondary and forbidden by Section 8(e). If the union is seeking to protect the employment opportunities of its members, including those not in the unit, or of union members in general, it

139 For example, the establishment of a pension plan in the construction industry.

140 358 U.S. 283 (1959). It should be noted that the Davis-Bacon Act constitutes an imposed wage standard restriction on the general contractor in the construction industry.

141 *Id.* at 293-94. This position was reaffirmed in *Fibreboard Paper Products Corp. v. NLRB*, 375 U.S. 963 (1964).

142 335 F.2d 709 (D.C. Cir. 1964).

143 *Id.* at 715-16.

144 *International Hod Carriers Union (the Calumet Contractors Ass'n case)*, 133 N.L.R.B. 512 (1961).

has the secondary object of being directed toward the terms and conditions of employment of employees not represented by them. Such a clause is a non-mandatory subject of bargaining¹⁴⁵ and, if carried out, would violate Section 8(b)(2). This is not to say that employees in a bargaining group do not have an interest in what happens to other union members, but that Congress, in enacting Section 8(b)(4)(B), deemed such a relationship too remote when weighed against the spread of disputes.¹⁴⁶ In view of this, the Board has held clauses aimed at other than the union employees as violative of the Act.¹⁴⁷

In the construction industry, there are found many clauses providing that the subcontractor shall perform for the prime contractor in accordance with all the terms of the prime contract. The Court, in *Building and Construction Trades Council v. NLRB*,¹⁴⁸ held that such a clause required a union to adhere to the full prime contractor's contract.¹⁴⁹ In *E. L. Boggs Plastering Company*,¹⁵⁰ the Board upheld such a clause as being exempt by reason of the proviso¹⁵¹ where it appeared that all the subcontractors referred to were either members of the multi-employer unit or could be under Board law. A problem arises where the prime contract contains a recognitional clause and all subcontractors would not constitute an appropriate multi-employer unit. It is possible under such a clause that a subcontractor might be forced to recognize a union not chosen by his employees. However, a more realistic reading would treat this as a work standards clause requiring the employer to adhere to all non-recognitional clauses. Of course, if the prime contract contains any other unlawful clause, the subcontracting clause would be unlawful as attempting to bind the subcontractor to a prime contractor's unlawful conduct.¹⁵²

D. Sympathetic Action Clauses

All sides in Congress agreed that the LMRDA amendments to the Act should not affect "struck work" and that the law developed under Section 8(b)(4)(B) should remain unaltered.¹⁵³ There are two branches of the struck work doctrine: (1) farmed-out struck work and (2) chain-shop work. Both branches, when embodied in subcontracting clauses, were held lawful under Section 8(e) by the Board in *Amalgamated Lithographers, Local 78* (the *Miami Post Co.* case).¹⁵⁴

1. *Farmed-out struck work*: In the *Miami Post Co.* case the struck work paragraph contained two parts: a general statement that the contracting com-

145 See text accompanying note 95 *supra*.

146 See text accompanying note 84 *supra*.

147 *Automotive Employees Union* (the *Greater St. Louis Automotive Trimmers Ass'n* case), 134 N.L.R.B. 1363 (1961).

148 328 F.2d 540 (D.C. Cir. 1964).

149 *Id.* at 541-42.

150 *International Hod Carriers Union* (the *E. L. Boggs Plastering Co.* case), 1964 CCH LAB. L. REP. ¶ 13664 (Dec. 15, 1964).

151 The Board did not discuss why the clause came within Section 8(e). In view of the fact that the Board said that the clause could be enforced under Section 8(b)(4)(B), it is likely that the Board also considered the clause primary and exempt from Section 8(e).

152 *Cement Masons, Local 97*, 1964 CCH LAB. L. REP. ¶ 13597 (Nov. 30, 1964).

153 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1360 (1959).

154 *Amalgamated Lithographers* (the *Miami Post Co.* case), 130 N.L.R.B. 968, 974 (struck work), 975 (chain shop) (1961).

pany would not render production assistance to any employer whose plant was struck by the International, and an implementation clause which provided that employees would not be required to handle any work "farmed out" by such employer other than work which the contracting employer had customarily performed for the struck employer. The Board, relying on Section 8(b)(4)(B) cases¹⁵⁵ and emphasizing the fact that the clause specifically preserved the contracting employer's right to continue to do work which he had customarily performed for the struck employer, held this clause lawful. The result of an effective primary strike is to shut down the employer's operation. If the struck employer can avoid the strike's impact by having another employer perform the struck work, then the strike would fail. In such a situation, the law looks behind the facts to see that the primary-secondary dichotomy has broken down and tries to administer the Act to prevent the primary employer from avoiding the impact of the strike on his own business. If the secondary (contracting) employer purposefully and knowingly enhances the economic strength of the primary (struck) employer, the secondary, by engaging in such conduct inconsistent with his professed neutrality, has abandoned his neutral status and joined cause with the primary and should be subject to the same economic pressures. In such a situation, the secondary employees are being used as replacements for the strikers and are, therefore, being forced to become involuntary strike breakers. What has happened is a switch in the roles of the parties—the contracting employer's and the struck employer's joint venture is that the primary employees and secondary employees, as employees of the joint venture, are now primary employees entitled to all the rights of primary employees, including the right to strike their employer. Since Section 8(e) prohibits employers from ceasing to do business with *another* person, the contracting employees, by refusing to perform services for their own employer, the joint venture, do not come within the scope of the Act.¹⁵⁶

2. *The Chain-Shop clause:* This clause recognizes the right of employees to strike if employees in another plant "wholly or commonly owned and controlled" are on strike or have been locked out. The company at which the strike occurs must be one with the contracting employer at which the sympathy strike occurs. A factor frequently stressed in finding a single employer is centralized control over labor relations. In *Miami Post* the Board construed the chain-shop clause to mean that a strike at the plant of the contracting employer in sympathy with a strike at the plant of another company which is a separate legal entity is permitted, provided that the two legal entities, because of common control and ownership, constitute a single employer within the meaning of the Act, and held it lawful.¹⁵⁷ Here again, it follows that if there is but a single employer, all the employees are primary employees and, since Section

155 *NLRB v. Business Machine and Office Appliance Mechanics Union*, 228 F.2d 553 (2d Cir. 1955); *Douds v. Metropolitan Fed'n of Architects*, 75 F. Supp. 672 (S.D.N.Y. 1948).

156 The above analysis applies only where the contracting employer is receiving work from the struck employer. It would not apply to the situation where the contracting employer receives the work from a general contractor who gives them work which was formerly done by a subcontractor whose employees are on strike. *Truck Drivers Union (the Patton Warehouse case)*, 140 N.L.R.B. 1474, 1483 (1964).

157 *Amalgamated Lithographers*, 130 N.L.R.B. 968, 975 (1961).

8(e) deals solely with action aimed at *another* "employer" or *another* person, a chain shop or sympathetic action clause would not come within the prohibition of the Act.

What if the struck plant's clause gave the employees in other plants of the employer the right to take economic action against their own plant? This is the reverse of the normal chain-shop clause discussed above. The fact that the clause is with one part, rather than another part, of a single enterprise appears to be irrelevant to the employees affected. In fact, the Board in *Central States Painting and Decorating Co.*¹⁵⁸ held that a local in one jurisdiction had a right to require an employer to adhere to the lawful provision of a collective bargaining agreement between the employer and a local of a second jurisdiction which required the employer to adhere to all lawful clauses in effect in other geographic jurisdictions.¹⁵⁹ In *Houston Insulation Contractors Ass'n*,¹⁶⁰ the Board applied the above ruling to a subcontracting clause.¹⁶¹

E. Termination Clauses

The "right-to-terminate" clause provides that the union shall have the right to terminate the contract in the event that the employer violates the agreement. Thus, the termination clause gives the union a remedy in the form of self-help for a violation of another clause. The Board in *Miami Post* held that the lawfulness of this clause would depend on that of the clause it is being used to implement.¹⁶² Therefore, a decision as to the legality of a particular subcontracting clause will also determine the status of the termination clause.

F. Picket Line Clauses

While not a subcontracting clause, a picket line clause, which is found in many contracts, is considered because of its possible effect on other clauses in a contract. In *Patton Warehouse*¹⁶³ the Board held unlawful a clause which provided "it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line . . .," because it failed to conform to the Section 8(b) proviso.¹⁶⁴ The Court of Appeals for the District of Columbia,¹⁶⁵ while rejecting the Board's reliance upon the proviso, held that Section 8(e) was inapplicable to clauses allowing employees to cross a lawful primary picket line.¹⁶⁶ However, for the picket line proviso to have meaning, it is possible that the proviso could exempt a union representing a third employer

158 Painters' Dist. Council (the *Central States Painting & Decorating Co.* case), 1964 CCH LAB. L. REP. ¶ 13142 (May 22, 1964).

159 *Id.* at 20,962-63.

160 Locals 22 and 113, Int'l Ass'n of Heat Workers (the *Houston Insulation Contractors Ass'n* case), 1964 CCH LAB. L. REP. ¶ 13401 (Sept. 4, 1964).

161 *Id.* at 21,458-59.

162 130 N.L.R.B. 968, 977 (1961).

163 140 N.L.R.B. 1474 (1963).

164 *Id.* at 1478.

165 *Truck Drivers Union v. NLRB*, 334 F.2d 539 (D.C. Cir. 1964).

166 In *Truck Drivers Local 696* (the *Freeto Constr. Co.* case), 1964 CCH LAB. L. REP. ¶ 13491 (Oct. 20, 1964), the Board did not except to the position of the Court and appears to affirm the Court's view.

from refusing to cross a picket line at a secondary employer's premises where the secondary employees are engaged in a secondary boycott strike approved by their representatives.¹⁶⁷

G. Savings Clauses

In *Miami Post* the Teamsters' contract contained a separability clause which provided that certain clauses were not to become effective until they had been declared valid by the Board or an appellate court. The Board found the clause ineffective because:

Section 8(b)(4)(A) prohibits strikes for the purpose of requiring an employer "to enter into any agreement which is prohibited by Section 8(e)." We have found above that the "trade shop" clause would be unlawful if agreed to by the parties. Accordingly, a strike for the purpose of forcing the employer to agree to such a provision is unlawful under Section 8(b)(4)(A). The strike is not made lawful by the "separability" clause. We are not required to decide whether the clause in question would effectively defer the operation of the "trade shop" and "refusal to handle" clauses, if the parties agreed to them. The complaint in this case alleges a violation of Section 8(b)(4)(A) and not of 8(e). Whatever the ultimate effect of the "separability" clause, the fact is that the Respondents did strike to compel the Charging Parties to agree to provisions in a contract which are prohibited by Section 8(e).¹⁶⁸

The Board's ruling is probably unsound. For a violation of Section 8(b)(4)(A), there must be a violation of Section 8(e). The Board's position is inconsistent. If the clause has no life by reason of the savings clause for purposes of Section 8(e), it necessarily follows that it is not prohibited by Section 8(e) and, hence, no Section 8(b)(4)(A) violation can be found. Even if both parties together could seek a declaratory order from the Board passing on the validity of the clause, this would be of little value. Normally, employers are extremely reluctant to yield to union requests for subcontracting clauses and when they do yield, they usually only give in to the most limited clauses possible. For a union to seek any more than this, it must use economic pressure. One answer might be for unions to submit the clause in advance for a ruling as to its validity. However, with the amount of work undertaken by the Board, it is unlikely that it would be willing to assume the added burden of advisory rulings. But the situation presented by *Miami Post* is the normal situation in which a declaratory order is appropriate. Until the Board clarifies its position on declaratory orders, it is unlikely that savings clauses will fare any better than did the clause in *Miami Post*.

Conclusion

At this point an author usually sums up the law to date and predicts where it is going. However, neither is possible with this subject. The reason is that the Board and the courts have had little time to work with the law in

¹⁶⁷ Even if the strike is not approved, a clause aimed solely at discharge, but not discipline or replacement, might be valid in any case.

¹⁶⁸ Amalgamated Lithographers (the *Miami Post Co.* case), 130 N.L.R.B. 968, 978 (1961).

order to develop guidelines. It must be remembered that the Board has developed the law on subcontracting clauses from nothing. Congress, in its zeal to punish all unions for the deeds of the Teamsters, did not adequately consider the law it was passing. What can be said is that the Board has adopted the law of Section 8(b)(4)(B), especially the primary-secondary dichotomy, and will uphold work preservation and work standards clauses to the extent they demonstrate a primary objective. Beyond this, it would be foolish to venture since the variety of possible subcontracting clauses is without limit. We can only hope that with the passage of time the Board, with the aid of the courts and labor commentators, will develop sensible law from the chaos handed it by Congress.